SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 696

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner,

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

and

WHEC, INC.,
VETERANS BROADCASTING CO., INC.,
Intervenor-Respondents

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI and RESPONSE TO COMMISSION'S OBJECTION TO PERFECTING THE RECORD

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI and RESPONSE TO COMMISSION'S OBJECTION TO PERFECTING THE RECORD

The respondent Commission filed a brief in opposition to the petition for writ of certiorari, and annexed thereto a reply to petitioner's pending motions for leave to use a prior record, and to perfect the record. That brief and that reply are dealt with before taking up the brief filed by the intervenor-respondents, WHEC and Veterans who did not oppose either of petitioner's pending motions.

Commission's Brief and its Opposition to Perfecting Record

The Commission does not oppose petitioner's motion to use the prior record in Appeal No. 12,252 from the court below, but the Commission is unwilling for this Court to have a perfected record submitted to it. The Commission's objection to allowing this Court to know the facts respecting the meeting of 11 March 1953 will be dealt with after discussing the "Statement" and the "Argument" in its brief in opposition to the petition for certiorari.

The "Statement"

The first sentence of the "Statement" in the Commission's brief (Br. 2, 3) begs the question that is most embarrassing to the Commission. Thus, the Commission abruptly declares that

> "On March 11, 1953, the Federal Communications Commission, by a three to two vote of the Commissioners present and participating, granted the applications [here in question]."

Being unable to dispute or deny the accuracy of the point-by-point review of the *facts* relating to the action of 11 March 1953 (see "*The Commission's Meeting of 11 March 1953*", Pet. 19-24), the Commission simply ignores the facts and states a conclusion that rides roughshod over the actualities.

Later (Br. 4), the Commission says that in Appeal No. 12,252, the court below rejected "petitioner's various procedural objections" and refused "to count a temporarily absent commissioner as voting against the grant"; but, the Commission neglects to note that the Court of Appeals reached *that* decision by relying upon minutes of the Com-

mission which are *now* categorically *disputed by the record*. Thus, in Appeal No. 12,252, the Court of Appeals said:

> "Appellant [now petitioner] here renews its argument before the Commission that we should construe the vote taken on the intervenors' applications for a license at the March 11, 1953, meeting of the Commission as a tie vote, counting Commissioner Hennock's absence as a negative vote in view of her dissent. However, the Commission's minutes, duly approved by it and now urged upon us as valid by the Commission's counsel, shows a vote of three Commissioners in favor of the application, with two Commissioners opposed out of a total of five Commissioners voting, one Commissioner being absent when the vote on the Rochester application was taken. Nothing in law or fact authorizes us to reach any other conclusion than that the action in question was taken by majority vote of the Commissioners present and voting." (Pet. App. A9)

While it is known that the Court of Appeals did not care to receive evidence that would have embarrassed the position taken by the Commission on this point,[1] it is also evident from the record in this case that Commissioner Hennock has said, under oath, that she *did participate* in the consideration of the grants to WHEC and Veterans, and that she *did vote* against them. It is not clear to petitioner how the urging of Commission's counsel can offset the sworn statement of a commissioner, especially when the

[1] The reason for rejecting the evidence, of course, was never phrased in such terms. In fact, the Court of Appeals has never felt any need to explain why it was unwilling to require the Commission to disclose records that were pertinent (and in fact were the best evidence) to the question as to what actually happened at the meeting of 11 March 1953 respecting the Rochester applications.

Commission refuses to permit inspection of documentary evidence that relates to the specific factual conflict, and when the reviewing court refuses to ask that the secret materials be submitted to scrutiny.

Still later (Br. 4-5), after noting that the Commission, acting pursuant to the mandate in Appeal No. 12,252, framed issues "reflecting allegations in the protest", of 17 March 1953,[2] the Commission goes on to say that none of the issues so framed raised any question as to "the procedural validity of the Commission's original grants". And then the Commission adds, querulously, that petitioner never objected to the issues as framed, and never sought enlargement or modification.[3] To the extent that the Court of Appeals had *ordered* only a hearing on the protest—and, that is all that the remand in Appeal No. 12,252 categorically commanded—petitioner had no adjudicated right to any issue not based on a factual allegation in the protest of 17 March 1953; and, the protest of 17 March 1953 did not allude to the procedural irregularities of 11 March 1953 because, when that protest was framed, petitioner did not know (and did not then suspect)[4] that the Commission

[2] The President of Federal Broadcasting System, Inc., sent a telegraphic protest to each member of the Commission about midnight on 11 March 1953; those seven telegrams were received at the Commission before business commenced on 12 March 1953.

[3] The facts are otherwise. Thus, during the hearing on the protest, petitioner tried to prove economic injury caused by predatory practices of the Gannett enterprises, and to show that the share-time operators (each operating AM stations that competed directly with petitioner's WSAY) were supporting and bolstering their AM radio station business through the joint TV operation. At first, Gannett and its junior partner doubted petitioner could show any such loss—but when petitioner *did*, then they insisted that such evidence was outside any of the six issues—and the examiner ruled that the evidence (most of which had already been received) was inadmissible.

[4] The Commission has had more than its share of discrediting publicity of late. And without exception, those who have thus embarrassed the Commission took some part in the actions complained of by petitioner

would suppress the facts relating to the irregularities resorted to in the meeting of 11 March 1953 in order to deliver to the Gannett empire the star it started to adorn its crown.[5]

The "Argument"

Briefly, the Commission advances two arguments: (1) That the Commission acted within limits of its committed discretion; and, (2) that since the Court of Appeals did not *expressly* rule upon issues presented to it by petitioner in Appeal No. 15,005 (the case from which the present petition comes), those issues cannot be heard by this Court.

In concluding its first argument, the Commission admits (Br. 7, footnote 5) that it failed "to resolve in terms the final issue" of the six issues that it had *itself* framed to govern the hearing on and determination of petitioner's protest. The Commission proceeds to suggest that its failure to resolve the "ultimate question" presented by petitioner's protest is without significance *since* an evaluation "of the public interest" had been made when it originally approved the grants to WHEC and Veterans on 11 March 1953. Even if that statement were true—and it is totally, utterly, and demonstrably false—the Commission was still obligated to respect and dispose of its own issues in reaching a final decision on petitioner's protest, for the matters and things called to the Commis-

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in this case. Nothing can be more useful in restoring public confidence in an agency such as the Commission than for the courts to make it clear that *any* deviation from, or failure to respect, the public interest, will be dealt with.

[5] The *only* way Gannett could have obtained a TV grant in Rochester was to sneak it through, as it did. This *assumes* (1) that Gannett *was* innocent of the wrongdoing uncovered in FCC v. WOKO (1946) 329 U.S. 223, and therefore not to be *suspected* of evildoing in the instant case; and, (2) that the named wrongdoers in that case, at least one of whom happens to be a large shareholder in WHEC, Inc., were not again prepared to employ unlawful means.

sion's attention during the hearing on the protest can never, by the wildest stretch of fiction, be deemed to have been evaluated on 11 March 1953. And, the Commission's *own* minutes of that meeting—minutes disputed by petitioner and which, at all events, required nearly five months to get a vote that even purported to constitute an approval—do not contain anything to support the assertion that public interest, convenience, or necessity was in any wise considered by those who voted in favor of the Rochester applications.

The fact is that the Commission has never yet made in this case any determination upon the statutorially required issue of public interest, convenience, and necessity, i.e. Sections 307(a) and 309(a) of the Communications Act.

Before turning to the Commission's last argument, petitioner invites this Court to note that neither the Commission's brief nor the brief filed by WHEC and Veterans takes issue with the judicial admission reported on page 25 of petitioner's forward brief. Thus, it is now admitted in this Court that the Commission, speaking through its own counsel, in Appeal No. 15,005 confessed to the Court of Appeals that it not only *did not* conclude that the grants to WHEC and Veterans were in the public interest, but in fact it *could not* have reached such a conclusion upon the record in this case.

The Commisison's second and final argument is a curious one. Thus, while conceding that petitioner, in Appeal No. 15,005 (from which this petition comes) asked the Court of Appeals to review the procedural irregularities surrounding the meeting of 11 March 1953 and the approval, on 5 August 1953, of the minutes of that meeting, the Commission submits that *since* "there is no evidence that [those issues] were passed upon by the court below" in Appeal No. 15,005, they are not "properly presented by

the instant petition" (Br. 8). In other words, the Commission contends that this Court cannot consider an issue unless the court below saw fit to recognize and pass upon it. If such a far-reaching rule has a place in the disposition of this case—and the Solicitor General says that it does—then this is one of the most important cases likely to reach this Court in this term.

But, more to the point is the fact that the action taken on 11 March 1953 either was or was not the action of the Commission. And, without good reason, the Court of Appeals was not free to ignore issues framed to that question. In conceding that the court below does not appear to have examined into those issues, the Solicitor General advances still another reason justifying the writ in this case.

The Commission's Opposition to Perfecting the Record

There are two arguments advanced by the Commission in support of its desire to keep secret the documentary evidence that would, if exposed, demonstrate that on 11 March 1953 there was no lawful grant authorized to WHEC and Veterans. The first is procedural, and the second is too.

The Commission argues that since the motion to perfect the record was not *repeated* in Appeal No. 15,095, even though petitioner renewed its attack on the validity of the action taken at the meeting of 11 March 1953, it was untimely for petitioner to ask this Court to perfect the record.

The legitimate interest served by such a contention is that of requiring litigants to submit their full case in the court below. And that is precisely what petitioner did. To carry such a rule of convenience to the point urged by the Commission would serve no legitimate interest and

would, instead, serve in this case to help the Commission guard the secret documents that disclose the unlawfulness of the action it purported to take on 11 March 1953.

Its second argument is that the sort of evidence sought by the Motion to Perfect the Record "are not part of the final administrative record to be certified to the Court of Appeals under Section 402(d) of the Communications Act" (Br. 13). And, petitioner never said the contrary. But when an agency certifies a falsehood, it cannot escape exposure on the ground that its certification is inviolate and no one should look behind it.

The Brief of WHEC and Veterans

The brief filed by WHEC and Veterans advances only two contentions.[6] Although neither is quite clear, it seems that the brief's first argument is that since the Court of Appeals apparently felt that the record supported the opinion reached by the Commission, it would be improper

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[6] In passing, it may be noted that on page 2 of the brief filed by WHEC and Veterans the following statement is found:

> "* * * In its petition for certiorari, petitioner paints an ominous picture of the Gannett enterprise but *admits* that it is not 'a sinister organization' (Pet. 29). * * *" (Emphasis added)

Petitioner made no *admission* when it said that the Gannett empire was not a sinister organization. That was an accusation, albeit an accusation of ingratitude. Thus, a cleverer organization than the one created by Gannett would exercise its power in a subtle manner. But, Gannett exercises its power arrogantly. Gannett wields its power as a bludgeon in full view of any who care to watch the spectacle—it is not held in a concealed left hand. For example, when a syndicated writer such as David Lawrence had some kind word for a Senator disliked by the Gannett people, the Gannett censor of Rochester blandly announces that the people in Rochester would not be allowed to read that column on that day by that writer. (*See*, DEMOCRAT-CHRONICLE, Rochester, N. Y., for 28 May, 1953, Page 24-A). There is nothing sinister about that sort of conduct! And, to say that those who act thus are not sinister is not to make an admission.

for this Court to grant certiorari unless petitioner could show that the Court of Appeals had misapprehended or grossly misapplied the standards for determining the substantiality of the evidence in a record (taken as a whole) to support the Commission's finding.[7] But, in the case at bar, the Commission reached no conclusion with respect to the ultimate question (i.e., the question required by Sections 307(a) and 309(a) of the Communications Act as to public interest, convenience, or necessity) that faced the Commission, hence there was no question before the Court of Appeals as to whether the record supported the Commission's conclusion. WHEC and Veterans admit, in their brief, that upon remand in Appeal No. 12,252,

> "* * * [t]he ultimate question [for the Commission] was to determine whether, on the basis of the record, the grants to WHEC and Veterans' . . . were contrary to the public interest, convenience, and necessity. * * *" (Br. 2).

In substance, that is the question that was posed by the sixth issue framed by the Commission upon remand in Appeal No. 12,252, the only difference being that the sixth issue was phrased affirmatively. Since the Commission reached no conclusion on that issue, it was impossible for there to be any question as to whether the evidence *supported* a finding on the "ultimate question." And, consequently, such cases as WHEC and Veterans cited in their brief on this point are inapposite.

The second point in the WHEC-Veterans brief is, like the first, a bit difficult to decipher. Presumably, however, it

[7] Citing, primarily, NLRB v. PITTSBURGH S. S. CO., (1937) 340 U.S. 498, 502.

argues that by terms of the Administrative Procedures Act, petitioner lost the right to question the rulings of the Court of Appeals in matters relating to procedure because petitioner did not appeal from the ruling in Appeal No. 12,252; and that, in any event, the procedural questions petitioner endeavors to raise in this Court are unimportant since they arise from a factual situation that is "unique and improbable of ever again" occurring.

The section of the Administrative Procedures Act on which WHEC and Veterans rely, however, is applicable only to an "order granting or denying an interlocutory injunction" of a specified sort. Here, there was no interlocutory injunction, therefore the authority they cite is pointless. But, even if that statute were applicable, this Court would not be foreclosed from hearing this case.[8] And, that leaves WHEC and Veterans contending, nakedly, that this Court should not be disturbed to know that a willful group of former commissioners flouted the law and, in the name of the Commission, unlawfully delivered a valuable public asset into hands that may be expected to employ it against the public interest.[9] The basis upon which this contention rests is that it is unlikely that the Commission would ever

[8] Citing Section 1040 of the Administrative Procedures Act of 1946, as amended, 60 Stat. 237, 5 USC 1040. This statute commences with the words "An order granting or denying an interlocutory injunction . . ." The full-text appears on page 6 of the brief filed by WHEC and Veterans.

[9] In UNITED STATES v. U. S. SMELTING (1950) 339 U.S. 186, 198-199, the point contended for by WHEC and Veterans was rejected. In that case the District Court granted a temporary injunction forbidding enforcement of an ICC order. Instead of appealing to this Court, the remand was accepted, the case reopened, and the order reframed. The District Court was still displeased and granted a permanent injunction. Noting that when the case was remanded the ICC was free to take any action it wanted to—and the same was true when the Commission received the mandate in Appeal No. 12,252—this Court properly declined to read the earlier failure to appeal as foreclosing review after final judgment.

[10] An illuminating report on the practicality of this sort of danger is given in the recently published autobiography of T. S. Matthews, formerly *the* editor of TIME. In his book NAME AND ADDRESS (Simon

again do precisely the same thing that was done in this particular case.[11] In view of the changes that have occurred in the Commission since 1953, and due to the continuing public criticism of the Commission and various of its officials, it may well be that if this identical case were to be presented to the Commission de novo, Gannett and its partner would get nowhere. But *that* is certainly no reason for refusing to correct the errors that were made in this case—errors which prejudice some 500,000 to 1,000,000 people living in the Rochester area.

Conclusion

Instead of demonstrating any valid reason against granting the writ now sought, the Commission as well as WHEC and Veterans have helped make it clear that this case merits review by this Court. To facilitate that review, the record should first be perfected by granting petitioner's pending motion therefor.

Respectfully submitted,

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and Schuster, New York, published 24 March 1960) there is a good bit of information on how TIME mangled the news for purposes that pleased its owner, especially pages 250-274. Indeed, when Henry Luce was asked "Under what circumstances would you make TIME a political instrument" he replied "If I thought the Republic was in danger." As former editor Matthews points out, however, Luce reached the point of believing that the Republic was in danger any time the Republican Party was not in control (p. 274).

[11] Upon this identical principle, this Court should never review the conviction of a man condemned to death, if the facts in his case are peculiar and unlikely to again occur; and, if a man is about to be executed, even though innocent, this Court should not be concerned because *that* could only happen once.